BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The judgment of the Court of Appeals was entered June 11, 1940. (R233), petition, for rehearing was denied July 8, 1940 (R239) Reported in 112 Fed., 2nd, 522.

The jurisdiction of this Court is invoked under Title 28, Section 347 of the United States code. The facts have been fully set forth in the petition for Certiorari, page 1 to 9 supra.

SPECIFICATION OF ERRORS ASSIGNED—

The Court of Appeals 5th Circuit erred in holding that the indictment on which they were convicted did not contain duplicitous averments inasmuch as that indictment specifically alleges two schemes to defraud and a scheme to obtain money by false pretenses, since the first count, which is included in subsequent counts, setforth a scheme to obtain money from individuals by means of false pretenses, representations and promises and also two separate schemes to obtain the funds of two insurance organizations by obtaining control over such organizations and then by fraud depriving these organiz-

ations of their funds—and no false promises, representations or pretenses have any connection with these schemes, thus directly pointing out in the indictment itself that differentiation between the two schemes, which the court in the Livezey Case 279 Fed. 496, quoted in the opinion of the Circuit Court of Appeals herein, said was not indicated.

II.

The Court erred in holding that evidence of acts not even shown to be criminal, but which the Court below said tended to show fradulent intention, was admissible, although these so-called acts showing intention were committed after the date of the indictment herein and in some instances after the date of the first trial of these defendents and in no case was any connection of all defendants shown in connection with such acts.

III.

The Court erred in holding that no error was committed by the lower Court in stating, while overruling an objection of defendants' counsel, in the presence of the jury:

> "Mr. Hughes that is not true in a criminal case — there was no matter pending before the Court as to which the Court could have ordered an audit made.

"Further, a defendant in a criminal case is not required to furnish evidence against himself, and if he refused to let the Government see his books, the Government has no legal means of getting at them."

ARGUMENT

The indictment charged three separate and distinct schemes condemned by Penal Code section 215, U. S. Code T. 18, Sec. 338, two of these schemes being simple schemes to defraud by obtaining control of funds belonging to two separate corporate entities and the third to obtain money and property by false and fraudulent representations and promises from various individuals.

This indictment was attacked in the lower court as duplicitous, and error assigned to the adverse ruling on the demurrer, which error was again made by the Court of Appeals and is specified here.

With the Courts permission we will trace the history of the statute now section 215, Penal Code, formerly United States Revised Statute 5480.

Originally U. S. R. S. 5480 required that the scheme include intent to use the mails, but in 1889, the section was changed to read:

"If any person, having devised, or intending to devise, any scheme or artifice

> to defraud or to sell, etc. ** any counterfeit or spurious coin ** or anything ** held out to be counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called 'The Saw Dust Swindle', etc."

The Court can see that as the Statue then read there was a clear distinction between a "scheme to defraud" and a scheme to obtain money in distinctive ways.

When the Criminal Code was adopted, in 1909, Congress, calling this Section 215, enacted.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud [or for obtaining money or property by means of false or fraudulent pretenses, representations or promises"].

It is clear that in 1909 Congress deemed it necessary to enlarge the scope of the section dealing with "using mails to promote frauds," and to declare that in addition to devising a scheme "to defraud," it was a crime to devise a scheme "to obtain money by false and fraudluent representations, pretenses or promises."

In Moore vs. U. S. 2 Federal (2) 839, 841, the court distinguishing between the

language of the original act and the new words "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," said,

> "The added words were evidently intended to enlarge the scope of the act, and to denounce and punish the use of the mails in execution not only of a scheme to defraud, but also of a scheme to obtain money by false pretenses or promises under circumstances where but for the false pretenses and promises the money or property would not be parted with."

The Supreme Court of the United States in United States vs. Young, 232 U. S. 155, reversed the decision of the lower court holding bad the first count in an indictment which charged "a scheme and artifice to defraud."

The Supreme Court said:

> "The District Court ** was of opinion that something more was necessary to an offense under Sec. 215 than the averment of the scheme and its execution in the manner stated. The Court expressed the view, we have seen, that the indictment did not clearly set out the scheme to defraud; that it did not allege the scheme devised or intended was by

means of false or fraudulent pretenses, representation or promise. *** It is manifest that the Court consider these facts were necessary to be averred in order to constitute an offense under S. 215. In this the Court was in error." pp. 161, 162.

There is another feature in the cited case, Young vs. United States, which is pertinent.

After the first count, there was a second, which charged defendant,

> "With having devised a scheme and artifice for obtaining moneys, goods, and chattels by means of false and fraudulent representations and promises etc.'

This is taken from the opinion of the Supreme Court which added "The manner and means are charged as in the first count.

It is obvious that the Supreme Court gave its approval to an indictment which did not confuse "a scheme to defraud" with a "scheme to obtain money or property by means of false and fraudulent pretenses, representations or promises," and by so approving showed that "a scheme to defraud" which did not need allegations about "false or fraudulent pretenses, etc." was a distinct and separate offense from a "scheme to obtain money etc." which did require such an allegation.

This decision shows clearly that Congress added new words deemed necessary to meet its purposes.

In the indictment herein considered there is a complete answer to the statement of the 5th Circuit Court of Appeals in Livezey vs. United States 279 Fed. 496, where that court said:

> "It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to see any."

That difference is clearly pointed out in this indictment where one fraud was to be committed by securing control of corporate funds to misappropriate and the other by representation to persons which would deceive and having secured their money or property defraud them of it.

2. The second specified error was in permitting evidence of transactions which were not criminal in themselves and which according to the per curiam of the court found under Bill of Exemptions 2 (R120).

> "Were admissible as corroborative of the main charge, and for the purpose of showing intent and to illustrate the full extent of the scheme."

The law on the subject of admission of evidence of this nature is: 1st, it is necessary to show that such transactions were connected with actual violations of the law, and 2nd, that they could only affect the parties shown to participate in them. See Coulston vs. United States 51 Fed., 2nd, 178, 180; McLafferty vs. United States 77 Fed., 2nd, 715, 719-20: Parish vs. United States 260 Fed. 529, 531 in which Judge Sanborn says:

> "It is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive."

None of these features were present in Fish vs. United States 215 Fed 545. Judge Bingham of the First Circuit said, p549,

> "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all only in plain case."

Had there been but one instance of the admission of this character of evidence, counsel might not insist on this as a reason for reversal, but in numbers of instances this sort of evidence was introduced. For example see R 117, 127, 133, 135, 141, 145.

The trial judge himself furnishes proof

of the dragging in of such things as the "Resume" inserted by him in connection with his per curiam and shown in (Record) 137, 138.

3. Bill of Exception No. 20 (R 147, 148) was based on the sustaining by the Court of an objection to a cross examining question asked of a government witness, L. O. Taylor, Post-office Inspector, who was the same person that read the "Resume" previously noted. In the course of this cross examination Taylor had stated that he had asked of the American Benefit Association permission to audit its books and was refused. Some of the defendants were its officers.

Taylor was then asked by defendants' counsel if he did not know he could have made application to the District Judge for the appointment of an auditor and the judge would have ordered one.

On Government counsel's objection, the Court said:

> "Mr Hughes, that is not true in a criminal case — there was no matter pending before the court as to which the court could have ordered an audit made.
>
> "Furthermore a defendant in a criminal case is not required to furnish evidence against himself, and if he refused to let the Government see his books, the Government has no legal means of getting at them."

This error of the Court gave the picture to the jury—a very prejudiced one—of an act of concealment on the part of one of the defendant companies, which should have been referred to as "it" and not "he".

The law is not as the Court stated it.

> In Wilson vs. United States 221 U. S. 361, the Supreme Court of the United States said, and has repeatedly reaffirmed, "The corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production on the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books to duly constituted authority when demand is suitably made."

Hence it follows that an audit can be made by the government of books by legal process even though the object be "to discover its violations of the law."

The same rule applies to an officer of the corporation with reference to the corporation books. 1d.

It is respectfully submitted that the petition for certiorari should be allowed and the Honorable Supreme Court of the United States, after hearing should reverse the judgment of the Court of Appeals, 5th Circuit and order defendants discharged.

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